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Supreme Court, U.S.
FILED
JUL 29 1991
OFFICE OF THE CLERK

No. 90-1963

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

NICHOLAS DAMER,
Petitioner,

v.

SUPERIOR COURT IN AND FOR
THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent,

JOHN C. ELSTEAD, GERALD C. STERNS,
LAW OFFICES OF GERALD C. STERNS,
ELIZABETH W. WALKER,
LAWYERS MUTUAL INSURANCE COMPANY,
WEIL ADJUSTERS & CONSULTANTS, INC.,
GERSON MEHLMAN, and ROBERT L. DENEBEIM,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether under California law and pursuant to the request of an attorney's client, a California state court may require the attorney to provide the client's files to an independent receiver?

2. Whether an attorney may be punished by civil or criminal contempt for violating a court order prohibiting the public dissemination of confidential information and documents?

3. Whether remedies were available to petitioner to contest the civil and criminal contempt judgments entered against petitioner for violating certain court orders?

LIST OF PARTIES

The only known parties to the current proceeding are those noted on the caption of the petition.

The underlying case out of which the contempt judgment arose included these additional parties:

Plaintiff:	MARIA SEWARD SARGENT
Defendants:	TAD SHAPIRO
	JEANETTE SHIPMAN
	WALTER WALKER III

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Respondents Gerald C. Sterns, Law Offices of Gerald C. Sterns and Elizabeth W. Walker (hereinafter "Respondents") respectfully request that this Court deny the petition for writ of certiorari filed herein by petitioner, Nicholas Damer. Denial of the instant petition is warranted for the following reasons:

1. No substantial, independent federal question has been raised by petitioner in this matter.

2. The questions addressed in this petition are issues concerning state matters and law and the contempt judgment entered against petitioner is supported by independent and adequate state grounds.

3. Any federal questions addressed in the petition were not raised in a timely manner in the courts below.

Additionally, pursuant to U.S. Supreme Court Rule 24.6 respondents hereby request that this Court strike the entire petition on the grounds that it contains "... burdensome, irrelevant, immaterial and scandalous matter." In Appendix C to his petition, petitioner has cited from a certain memorandum which has been ordered sealed by the California lower court. The document in question was never introduced as evidence in the proceedings below. The contents of the document have absolutely no relevance to the issues presented for this Court's consideration. Indeed, it contains obvious hearsay and appears to be nothing more than a draft, prepared by a former and now deceased partner of the respondents. Respondents respectfully submit that petitioner has included this document in the petition for the sole purpose of harassment and embarrassment and is part of his continuing attempt to pursue a personal vendetta against the respondents. Such action on the part of petitioner clearly exemplifies the very violations of the state court orders which resulted in petitioner being held in contempt.

I

PROCEEDINGS AND DISPOSITION BELOW

The instant petition arises from a civil and contempt judgment entered against petitioner as a result of his violation of certain court orders. After entry of the judgment, petitioner pursued a petition for writ of certiorari to the California Court of Appeals. No federal question was raised by petitioner at that time. The petition was denied without comment. Thereafter, petitioner filed a petition for writ of certiorari to the Supreme Court of the State of California. That petition was also denied without opinion.

Petitioner currently has pending two appeals before the California appellate court. One appeal arises from the order of the lower court, the violation of which led to petitioner's contempt judgment. The other appeal arises from the judgment itself.

II

JURISDICTION

Petitioner seeks review under 28 U.S.C. § 1257; however, the Court lacks jurisdiction. No substantial federal question has been properly raised and necessarily decided in the state court proceedings.

III

STATUTES INVOLVED

Petitioner specifies several provisions of the Constitution. None of these were timely raised in the state court.

IV

STATEMENT OF THE CASE

For the sake of brevity, respondents hereby adopt the factual statements set out by co-respondent John C. Elstead. Additionally, pursuant to U.S. Supreme Court Rule 15, respondents believe the following facts are relevant to this Court's determination of the instant petition.

The order of the lower court arose as a result of a three day judicially supervised settlement conference. The plaintiff (petitioner's client) and two of her attorneys, as well as the respondents and their counsel, agreed that the terms of the settlement were to be confidential. Furthermore, the parties and counsel, save for petitioner, agreed that all of plaintiff's files regarding the underlying case which were in the possession of the petitioner were to be delivered to an independent receiver, a retired Justice of the California Court of Appeals. The agreement was reached in order to effectuate the confidentiality of the settlement as well as to maintain the confidentiality of information obtained during the course of litigation.

During the settlement conference, the lower court considered the issue whether the plaintiff's files belonged to plaintiff or the petitioner. With regard to this issue, the court determined that under California law, the file belonged to the plaintiff. Addition-

ally, the court found that extraordinary circumstances and good cause existed to require the sealing of certain documents and the maintenance of confidentiality of certain information. This ruling was made pursuant to the guidelines set forth in the California case of *Champion v. Superior Court*, 201 Cal.App.3d 777 (1988). Petitioner was presented with ample opportunity to brief and argue these issues determined by the lower court.

Contrary to the allegation of petitioner, no "sale" of "his confidential, private case and investigation files" took place. As noted, the court determined that under state law, the files belonged to the plaintiff and entered an order designed to accomplish the agreement reached among the parties. Furthermore, no "suppression of evidence" occurred. Pursuant to the court's order, any person, including petitioner, would have access to the records and files by presenting a motion to the court. Notably, the court order gave any investigative agency, including the California State Bar, unfettered access to the documents. In this respect, the court order in this case is clearly distinguishable from the order found to be defective in the case cited by petitioner, *Mary R. v. B. & R. Corporation*, 149 Cal.App.3d 308 (1983).

Despite the court order, petitioner refused to turn over plaintiff's files to the receiver. Instead, under the pretext of seeking a lien for his attorneys fees, petitioner filed a motion in an unrelated case where respondent Sterns was the lead plaintiffs' counsel. Petitioner included in his papers, certain documents which the court had designated as being confidential and had ordered sealed. In addition to filing these documents with the court, petitioner disseminated them to approximately 60 other attorneys in the case. Additionally, petitioner filed a petition with the California appellate court and attached as exhibits documents which the lower court had ordered to be confidential. Petitioner undertook these actions without complying with the lower court's order that the documents be filed under seal and in complete disregard for the rules set out in *Champion*, 201 Cal.App.3d 777, governing the proper method for transmitting sealed documents to the appellate level. Petitioner persists in flaunting the order by attaching Appendix C to this petition which is one of the documents ordered sealed by the lower court.

V

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner has brought the instant petition pursuant to 28 U.S.C. § 1257, arguing that the actions of the lower courts deprived him of certain constitutional rights. However, in order to pursue this petition, petitioner must show that the federal questions were timely and properly raised in the courts below and served as the basis for the final judgment. Moreover, no jurisdiction for review exists if non-federal grounds are adequate to support the judgment reached by the state court.

In the instant matter, petitioner has failed to make the requisite showing. To the contrary, petitioner did not raise the federal constitutional provisions he now relies upon in a timely and proper manner. Furthermore, independent and adequate state grounds exist which support the judgment of contempt against petitioner. Thus, petitioner has failed to meet the burden necessary for a writ of certiorari.

1. Petitioner Did Not Raise the Federal Constitutional Issues in a Timely and Proper Manner

Petitioner has failed to meet the requirements of U.S.C. 28 § 1257. The Supreme Court will not decide federal constitutional issues which were not raised in a timely and proper manner in a state court in accordance with state practice. *See Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). When the highest state court has failed to pass upon a federal question, it is assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party before the Supreme Court can affirmatively show the contrary. *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 549-50 (1987).

Petitioner cannot meet this burden. As a matter of policy, on petition for review, the California Supreme Court normally will not consider any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal. California Rules of Court, rule 29(b)(1). Petitioner failed to raise any federal questions before the California Court of Appeal.

The only reference to the United States Constitution in petitioner's brief in the California Court of Appeal reads as follows: "The federal Constitution, and related provisions of the California Constitution and the California Penal Code, *guaranteed* Petitioner a jury trial, *even if* the only criminal penalty were a fine, since the criminal charges were *misdemeanors* (*see* [Calif.] Penal Code §§ 166 and 689." (Emphasis in original.) Absolutely no mention was made concerning First and Fourth Amendment rights.

Given the California Supreme Court's refusal to grant the writ sought by petitioner, it is unclear whether the denial was based on consideration and rejection of federal questions raised for the first time in petitioner's brief or whether it was based on his failure to raise the federal questions in a timely manner. As in *Board of Directors v. Rotary*, 481 U.S. 537, it must be assumed the omission was due to want of proper presentation.

2. Independent and Adequate State Grounds Exist to Support the Judgment

In his petition, petitioner raises essentially two questions with regard to the entry of the contempt judgment against him: 1) whether he has a constitutional right to protection of his "work product," and 2) whether he may be punished by civil or criminal contempt for violating a court order requiring certain information be kept confidential and under seal. With respect to each of these matters, sufficient and independent state grounds exist for supporting the judgment.

a. Work Product

In his application, petitioner cites no authority for the proposition that his "work product" is protected from disclosure by the federal constitution. Petitioner's citation to *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) only supports the proposition that work product is not discoverable by opposing counsel.

In the proceedings below, the California court necessarily determined, after full briefing and argument on all sides, that the client and not the attorney owns the file, including what has been

referred to as the attorney's "absolute work product" i.e. writings that reflect on attorney's impressions, conclusions, opinions, or legal research or theories. This determination is supported by ample California authority: *Academy of California Optometrists, Inc. v. Superior Court,* 51 Cal.App.3d 999, 1005-1006 (1975) (Attorney withdrawing from representation must deliver to the client all papers and property to which the client is entitled, including notes, papers, memoranda and communications.); *Weiss v. Marcus,* 51 Cal.App.3d 590, 599 (1975) (Work product belongs to the client.) California Rule of Professional Conduct 3-700 (D); California Code of Civil Procedure § 2018(f). Thus, under state law, the plaintiff as well as the lower court had the right to require petitioner to turn over his work product to the independent receiver.

b. Orders Regarding Confidentiality

Petitioner was also cited for violating the lower court's order prohibiting public disclosure of certain information and documents. In particular, petitioner violated the court's order by disseminating the document which he has included in the instant petition as Appendix C. Contrary to petitioner's assertion, he apparently obtained this document pursuant to a subpoena after contacting *ex parte* the wife of Thomas G. Smith, now deceased, who was a law partner of the respondents. Notably, Thomas G. Smith and his professional corporation were named defendants in the underlying lawsuit and were represented by counsel.

Clearly, the lower court had the authority to enter an order prohibiting the dissemination of this document, which petitioner obtained through court process, in order to protect the privacy rights and reputation interests of the respondents. With respect to pre-trial discovery and the use of court processes, this Court stated in *Seattle Times v. Rhinehart,* 467 U.S. 20 (1984):

> There is an opportunity, therefore, for litigants to obtain—incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes . . . The prevention of the abuse that can attend the

> coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders. *Id.* at 35-36.

Given the propriety of the initial order, the court was likewise within its authority to hold the petitioner in contempt for violating the order. Thus, the contempt judgment entered against him was correct and proper.

Petitioner also deliberately and intentionally failed to follow the requirements set forth in *Champion v. Superior Court,* 201 Cal.App.3d 777 (1988) governing the proper procedure which litigants must follow in filing documents which are subject to a confidentiality order. According to the court in *Champion*:

> Where documents have been sealed by order of the lower court, over a petitioner's objection, the petitioner's obligation to present them to the appellate court does not change. *When pertinent to the writ petition, they should be presented separately, labeled as confidential, and accompanied by petitioner's objections.* Real Party in interest must then move for an order sealing the documents in the appellate court and shoulder the burden of proving the need for sealing. (Emphasis added) *Id.* at 789.

Thus, in this instance, petitioner was found in contempt for his disregard of the law and the specific order of the lower court.

3. The Contempt Proceedings Did Not Violate Petitioner's Constitutional Rights

Lastly, it is clear that petitioner was not deprived of his rights to due process and equal protection as a result of the entry of the contempt judgment. The Constitution does not guarantee a jury trial and right of cross-examination in a contempt hearing. *Merchants' Stock & Grain Co. v. Board of Trade,* 201 F. 20 (8th Cir. 1912) (Right to confrontation does not apply to contempt proceedings); *Muniz v. Hoffman,* 422 U.S. 454, 475-77 (1975) (Right to a jury trial does not apply to contempt proceeding resulting in $10,000 fine unaccompanied by imprisonment). Furthermore, petitioner has had, and continues to have, access to the

California Courts of Appeal, and he has exercised this right on numerous occasions. Therefore, no substantial federal question has been raised in this instance concerning the procedures followed by the lower court in holding petitioner guilty of contempt.

VI

CONCLUSION

For these reasons, respondents respectfully request that the petition for a writ of certiorari be denied. Respondents further request that the petition be stricken in light of petitioner's obvious disregard of the sealing order entered by the lower court.

Respectfully submitted,

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